

**TESTIMONY OF  
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Dear Chairman Coble and Representative Scott:

Thank you for inviting me to appear before your Subcommittee today to discuss the Death Penalty Reform Act of 2006.

I have been a practicing criminal defense attorney in Columbia, South Carolina, for 28 of the last 30 years, and since 2004 I have been running a law school clinic that enables students to assist court-appointed defense counsel in death penalty trials throughout Virginia.

I have also been a close observer of the federal death penalty for more than 14 years, beginning in 1992. In January of that year, the federal defender system contracted with me and Kevin McNally, a colleague in Frankfort, Kentucky, to provide expert assistance on an "as-needed" basis to federal defenders and court-appointed counsel in federal capital cases brought under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e). Ever since then, Mr. McNally and I (joined in 1997 by a third lawyer, Richard Burr of Hugo, Oklahoma), have worked part-time to assist counsel appointed to defend the increasing numbers of federal death penalty prosecutions brought under § 848(e) and later under the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et seq.).

In addition to working with individual court-appointed lawyers, our responsibilities as Resource Counsel include:

- identification and recruitment of qualified, experienced defense counsel for possible appointment by the federal courts in death penalty cases,
- monitoring and data-collection concerning the implementation of the federal death penalty throughout the nation's 94 federal districts,

- development of training programs and publications, including a web site, [www.capdefnet.org](http://www.capdefnet.org), to assist federal defenders and court-appointed private counsel in death penalty cases;
- responding to Congressional inquiries addressed to the federal defender system concerning proposed capital punishment legislation, and
- to the extent possible, maintaining a liaison between the federal public defender system and the Department of Justice regarding the administration of federal death penalty statutes.

This effort has led to our involvement, to a greater or lesser extent, in most of the federal death penalty cases brought by the federal government since the beginning of 1992. My comments on the Death Penalty Reform Act of 2006 today are based on our Project's experiences and observation of how the federal death penalty has actually operated in the federal courts of this nation. These comments are intended to provide information about actual practice in this complex area of the law, rather than an abstract discussion. My comments, of course, reflect my own views, and not those of any agency or judicial entity.

I appreciate the opportunity to comment on the Death Penalty Reform Act. Because this area of the law is so complex, and because it is already governed by a variety of laws that sometimes work inconsistently with each other, it is critical that any changes in the law be carefully considered in context, and with an eye toward how these changes would affect the actual cases that come before the federal courts.

The sponsors of this legislation may hope that some of these changes will expedite the process and make it more efficient. This is a result that capital defense lawyers support, since the current process is confusing, enormously costly, slow, and prone to serious unfairness. However, many features of this legislation would compound rather than alleviate those problems.

I have not attempted to comment on every provision in this bill. Rather, I have limited my comments to sections that appear especially problematic, and to issues that may not be immediately apparent. Before making those comments, I would like to provide a brief description of the magnitude (or, more correctly, the

minuteness) of the role played by the federal death penalty in the nation's criminal justice system as a whole.

## **INTRODUCTION: THE CURRENT STATUS OF THE FEDERAL DEATH PENALTY**

Federal prosecutions account for a little over one percent of the prisoners currently on death row throughout the nation,<sup>1</sup> and well under one percent of the executions to date. This reflects the fact that, despite many expansions of federal jurisdiction over violent crime in recent decades, the prosecution and punishment of persons who commit murder remains overwhelmingly a state responsibility.

The Department of Justice ceased providing aggregated data on death penalty prosecutions to the American public after mid-2001. Our Project has identified a total of 371 defendants against whom the Attorney General has authorized federal prosecutors to seek the death penalty between 1988 and January 30, 2006. As of that date, 185 of these defendants had actually stood trial for their lives, and of those, juries had reached the point of making life-or-death decisions for 142, deciding to impose death on 49 defendants, and choosing life imprisonment without possibility of release for the remaining 93 (or almost two-thirds of the total). All of this activity has produced, thus far, a total of three executions. The President commuted one sentence, at the request of the Attorney General, due to grave doubts concerning the prisoner's guilt, and three more death sentences have been reversed on appeal; 42 men and one woman currently remain under federal sentences of death.

I should also note that the 371 cases in which the Attorney General has authorized the death penalty were culled from a much larger pool of more than 2000 homicide defendants against whom the federal death penalty could have been sought. Ever since Attorney General Reno centralized prosecutorial decision-making over federal death cases within Main Justice—by requiring review and decision by the Attorney General for *every* death-eligible case, regardless of whether line federal prosecutors wished to seek the death penalty or not---the

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<sup>1</sup>At the end of 2005, the NAACP Legal Defense Fund's authoritative *Death Row USA* inventory, [www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2006.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2006.pdf), listed 40 inmates then under federal death sentence. This represents less than 1.2 percent of the total of 3373 death row inmates nationwide. *Id.*

Attorney General and his or her Death Penalty Review Committee have reviewed roughly four times as many death-eligible cases as have been actually approved for capital prosecution. Put differently, Attorneys General Reno, Ashcroft and Gonzales have each authorized federal prosecutors to seek the death penalty in only between 25 and 30 percent of the cases in which death was legally available as a potential punishment.

In other words, it is clear that the Department of Justice has been somewhat selective in seeking the death penalty under federal law, and federal juries have been selective in imposing it when federal prosecutors have decided to seek it. That said, the racial make-up of capital defendants in the federal courts has been a source of continuing concern. Of the total of 372 defendants against whom the Attorney General has authorized federal prosecutors to seek the death penalty, 99 have been white, 64 Hispanic, 16 Asian/Indian/Pacific Islander/Native American, 3 Arab and 189 African-American. In all, 73% of the defendants approved for a capital prosecution to date are members of minority groups. Twenty-four of the forty-two defendants now on federal death row under active death sentences, or 57%, are non-white. When similar numbers first emerged from an internal DOJ study in September, Attorney General Reno called the data troubling and called for an in-depth review and analysis to determine whether race and ethnicity improperly influenced prosecutorial decision-making at any level.<sup>2</sup> Although Attorney General Ashcroft's Justice Department pledged to follow through with such a review in 2001,<sup>3</sup> five more years have now elapsed, and no results have been made public.

Another characteristic of centralized decision-making by Main Justice and the Attorney General is delay. The *average* time that has elapsed between indictment and a decision by Attorney General Gonzales to seek the death penalty has been 23 months, and a decision to waive the death penalty has taken an average of 18 months from indictment. While these averages have been inflated somewhat by a few atypical multi-defendant cases, the government has required an average of 10 months after indictment to complete the multi-tiered DOJ death penalty review

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<sup>2</sup>Marc Lacey and Raymond Bonner, "Reno Troubled by Death Penalty Statistics," N. Y. Times, September 12, 2000.

<sup>3</sup>Raymond Bonner, "Justice Dept. Set to Study Death Penalty in More Depth," N. Y. Times, June 14, 2001.

process even in “ordinary” cases that were ultimately selected for death by Attorney General Gonzales.

In sum, the federal death penalty system *as it is currently administered by the United States Department of Justice* appears to be cumbersome, selective, extremely slow, and highly concentrated on minority defendants. With this background in mind, I will now address the most important provisions of the Death Penalty Reform Act of 2006.

### **SIGNIFICANT FEATURES OF THE DEATH PENALTY REFORM ACT OF 2006.**

#### **Section 3, Subsection 2—Increasing the Roster of Offenses with “Automatic” Death-Eligibility.**

This subsection adds five more statutes to the already long list of federal homicide offenses that carry “built-in” death eligibility simply by virtue of a conviction of the substantive offense, *see* 18 U.S.C. § 3592(c)(1), and proof of a constitutional minimum level of intent. 18 U.S.C. § 3591(a)(2)(A)-(D). While it can be argued that such “automatic” death-eligibility is not in and of itself unconstitutional, Lowenfield v. Phelps, 484 U.S. 231 (1988), *but see*, United States v. McVeigh, 944 F. Supp. 1478 (D.Colo. 1996); such changes should be made advisedly, because they have no effect other than to extend the death penalty to cases involving ever-lower levels of aggravation.

To see why this is so, we must keep in mind that when it adds new statutory eligibility factors, Congress is not merely allowing the jury to “consider” such factors in capital sentencing. The jury can already consider all relevant sentencing factors as *non*-statutory aggravation, including the fact that the defendant was convicted of each of the five new statutes at issue here. 18 U.S.C. § 3593(c). Rather, the point of creating a new statutory aggravating factor is to authorize the jury to impose the death penalty *on that basis alone*, when no other statutory aggravating factor is present. Since the FDPA’s existing list of statutory aggravating factors already includes some 35 separate bases for death eligibility, some of them extremely broad (such as that the murder was committed after “substantial planning and premeditation”), the only practical effect of adding still

more factors is to make the death penalty available in that small category of cases where the murder was not otherwise aggravated.

Stated differently, the addition of these five statutes to the list contained in § 3592(c)(1) will create death-eligibility where it would not otherwise have existed *only* where the defendant

- did **not** kill after substantial planning or premeditation, 18 U.S.C. § 3592(c)(9),
- did **not** commit the murder during the commission of some other serious crime, § 3592(c)(1),
- did **not** have a serious prior criminal record, § 3592(c)(2-4, -10, -12, -15),
- did **not** create a grave risk of death to additional persons, § 3592(c)(5),
- did **not** torture or seriously physically abuse the victim, § 3592(c)(6),
- did **not** pay for the killing or commit it for money, § 3592(c)(7-8),
- did **not** kill an especially vulnerable victim
- did **not** engage in a CCE that distributed drugs to minors, § 3592(c)(13)
- did **not** kill a public official, and § 3592(c)(14), and
- did **not** kill or attempt to kill more than one person. § 3592(c)(16).

Once the effect of such new death-eligibility factors is properly understood, one might expect some actual showing of a need to further expand the list of death-eligible federal murders before adding more death-eligibility factors to this already-long list.

### **Section 3, Subsection 3—Expansion of Prior Firearms Conviction Aggravator.**

The purpose and effect of this amendment are both somewhat obscure. The Section by Section Analysis provided with the legislation does not explain whether the “prior adjudication” referred to in the section means (a) an adjudication prior *to the sentencing hearing* (which would include the just-completed trial on the merits of the capital murder that is the subject of the sentencing hearing), or (b) prior to the entire trial, or (c) prior to the firearms offense of conviction. However, since the second and third of these interpretations would mean that the amendment does not change existing law, it would appear that the first interpretation is the correct one. If that reading is correct (and I hope that the

Justice Department will provide the Committee with its own understanding of this amendment today), then the amendment appears to allow a single crime—a killing with a firearm by a person engaged in a federal drug or violent offense—to satisfy the government’s burden of establishing both a capital crime *and* a statutory aggravating factor sufficient to allow imposition of the death penalty.

The reason Congress originally enacted the 924(c) exclusion in the firearms aggravator, 18 U.S.C. 3592(c)(2), was to avoid making every firearm killing automatically death-eligible. This would otherwise have occurred because the firearms violation that serves as the predicate for the 924(j) conviction would do double-duty as a “prior conviction” of a “prior” qualifying firearms offense. By removing this exemption now, Congress would seemingly be making every federal firearms killing death-eligible, whether or not it would otherwise be warranted. In other words, there would be no requirement that the defendant have any genuinely *prior* record, and without requiring evidence of any *other* aggravating factor (such as substantial planning and premeditation, risk to additional persons, multiple victims, cruelty or torture, etc.)

As a practical matter, this change would only extend the death penalty to the very least aggravated firearms homicide cases—killings that occur with no planning, or that are unintentional. Truly aggravated cases are already death-eligible, and so will not be affected. This amendment is contrary to the now-widespread agreement among death penalty supporters and opponents alike that capital punishment should be reserved for the "worst of the worst."

The Section-by-Section Analysis on this point does not fully convey the significance of the change. Under existing law, the fact of the firearms conviction can obviously be considered by the jury “where the death sentence is sought based on 19 U.S.C. § 924(c), (j).” Unless I have taken too dire a view of this ambiguously-drafted provision, and it actually would mean nothing at all, what the change appears to mean is that when there exists no *other* legal basis for seeking the death penalty—when, in plain English, the murder was not aggravated enough to justify the death penalty—the government can *still* seek death based simply on the illusion of a “prior” firearm record which is not actually “prior” at all, but simply part of the crime of conviction.

The enactment of 18 U.S.C. § 924(j) in 1994 represented a potentially

enormous expansion in federal jurisdiction over homicide offenses, which from the founding of the nation have been primarily a matter for state law enforcement. The § 924(c) exclusion at least represented an effort to keep this huge change under some sort of commonsense check by ensuring that every 924(j) offense would not automatically become punishable by death in the unfettered discretion of the jury. Removing this restraint is unwise, unnecessary (because any truly aggravated 924(j) killing is already death-eligible under existing law), and open to constitutional challenge as impermissibly all-inclusive under the two seminal Supreme Court cases governing capital punishment law, *Furman v. Georgia* and *Gregg v. Georgia*.

### **Section 3, Subsection 6—Broad New Eligibility Factor for “Any” Threat to Use Violence to Obstruct Justice**

Again, this proposed new aggravating factor would extend the death penalty to a whole new range of cases that feature no other aggravating factor (in other words, that do **not** involve the killing of federal witnesses or officers, do **not** involve multiple victims, did **not** occur after substantial planning, was **not** committed in an especially heinous, cruel or depraved manner, and so on), based simply on proof that at some point in the past, the defendant had engaged in “any conduct,” including mere threats of violence, to obstruct the investigation or prosecution of “any” offense, including non-violent offenses and offenses having nothing to do with the killing. For example: under this provision, an otherwise non-capital murder would become punishable by death if, ten or twenty years before the murder, the defendant had threatened to beat up his wife if she called the police following a domestic disturbance. Of course, such evidence is generally *admissible* now, as nonstatutory aggravation. The only effect of this change would be to allow such evidence to constitute ***the sole legal basis for imposing the death penalty***. Again, there is currently no gap in the reach of the federal death penalty that justifies such a broad and arbitrary expansion. In fact, this represents such an extraordinarily broad change that I suspect it is unintentional, and may reflect a drafting error.

Moreover, even if language were added to make clear that the proposed “obstruction of justice” factor requires some nexus to the capital homicide offense at issue, the new factor would still be susceptible of very broad application, because it could be construed to apply to any murder committed to avoid arrest. If

so construed, such a relatively uncontroversial-seeming expansion of the federal death penalty could eliminate almost every remaining murder under federal jurisdiction that is *not* currently subject to the death penalty. That is, this provision could remove the last bit of legislative “narrowing” from the FDPA, leaving the decision to inflict or withhold death to the unfettered discretion of the jury in every case.

Eventually the Supreme Court may take up the question of whether a given capital punishment statute has become so all-inclusive that it fails the basic requirement of *Furman* and *Gregg* that the sentencer’s discretion be legislatively narrowed and guided. Ill-considered expansions of death-eligibility under the FDPA may bring that day closer.

#### **Section 4, Subsection (1)(C)–Authorization for Non-statutory Aggravating Factors Relating to Defendant’s State of Mind and Intent**

This provision, which allows nonstatutory aggravating factors relating to the defendant’s intent or state of mind to be used as aggravating factors, does not seem to change existing law and therefore is superfluous. If it does change existing law, its enactment might call into question the validity of previous death sentences imposed in partial reliance on various versions and permutations of this factor. See United States v. Higgs, 353 F.3d 281, 301 (4th Cir. 2003) (recognizing that after-enacted statutory aggravating factor violates ex post facto clause.) On its face, the language is also vague, and may open the door to the risk of appellate reversal that such vague factors carry with them. Cf. Jones v. United States, 527 U. S. 373 , 400-401(1999) (narrowly rejecting Eighth Amendment vagueness challenges to nonstatutory aggravating factors).

#### **Section 4, Subsection (3)(B)-(C) Unadjudicated Acts and Right to Cross-Examine Defendant**

These provisions, which allow for notice (and presumably presentation) of unadjudicated conduct in support of aggravating factors, and for government cross-examination of a defendant concerning his statements or testimony to the sentencing jury, also appear to do nothing more than restate existing law. If any change from existing law is intended, the Section-By-Section Analysis does not indicate what the change might be. Perhaps the latter provision is intended to

foreclose claims, already soundly rejected by the courts, *see e.g. United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000), *United States v. Hall*, 152 F. 3d 381(5th Cir. 1998), that federal capital defendants have a right of allocution (i.e. to make an unsworn statement) to the sentencing jury. In view of the fact that no federal appeals court has upheld such a right to date, there appears little present need to legislate in this area.

**Section 4, Subsection (4)(A) – “Intent” factors required by § 3591(a)(2) be found “during” a § 3593 hearing.**

On its face, this provision seems simply to state current practice, which is that the sentencing jury determines all factual elements necessary to render the defendant eligible for the death penalty during the course of a sentencing hearing under the FDPA. However, it is conceivable that the real purpose of this amendment is to create an arguable statutory basis (albeit a thin one) for a claim that federal trial judges no longer have discretion to “bifurcate” capital hearings under the Federal Death Penalty Act in order to assure that the jury’s fact-finding procedures are fundamentally fair. Since *Apprendi v. New Jersey*, 530 U. S. 466 (2000), and *Ring v. Arizona*, 536 U. S. 584 (2002), which held that the facts on which a defendant’s death eligibility turns are the functional equivalent of elements of an aggravated substantive offense of death-eligible murder, federal courts have increasingly recognized the need to segregate the jury’s fact-finding concerning these elements from the inflammatory and extremely prejudicial nonstatutory character and victim-impact evidence that the prosecution typically introduces in aggravation of sentence. The current proceeding taking place in *United States v. Moussaoui* just a few miles from here, in which the trial judge has required the government to prove, and the jury to find, that the defendant actually caused death on September 11 before beginning the emotionally overwhelming “victim-impact” phase of the proceedings, provides a good example of a case in which such bifurcation is clearly essential to assure a fair trial. Congress should do nothing to prevent trial judges from fashioning such practical, commonsense remedies in the future. If Subsection (4)(A) would have such an effect (and I am unable to discern any other effect it might have), it should not be enacted.

## **Section 4, Subsection (4)(B), (4)(C); (7) Mental Retardation Procedures and Re-definition**

Among other things, these sections create a procedure and standards governing the determination of whether a defendant is exempt from the death penalty by reason of mental retardation. The mental retardation exemption has been a feature of federal death penalty procedures since the first such procedures were enacted in 1988. *See* 21 U.S.C. § 848(l). It thus predates the Supreme Court's decision in Atkins v. Virginia, 536 US 304 (2002), that put this exemption on a constitutional footing. Unfortunately, the procedures proposed here fall well short of Atkins' constitutional minimum, and would thus contravene the Eighth Amendment.

The most serious defect is the definition of mental retardation set forth in the proposed 18 U.S.C. § 3593(b)(4):

For purposes of this section, a defendant is mentally retarded if, since some point in time prior to age 18, he or she has continuously had an intelligence quotient of 70 or lower and, as a result of that significantly subaverage mental functioning, has since that point in time continuously had a diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand others' reactions.

To be sure, the Supreme Court in Atkins did not impose a single binding constitutional definition of mental retardation. However, the above language is not a definition at all, but rather a listing of many of the characteristics of people with mental retardation that the Atkins Court regarded as justifying a categorical bar against the infliction of death upon such defendants. In effect, this provision would require the jury to redetermine anew in each case whether the Supreme Court was correct in Atkins when it found that these characteristics of mental retardation justified a categorical exemption.

Note that the provision requires the jury to find *all* of the listed characteristics (and that all these characteristics have manifested themselves "continuously" since some point prior to age 18) in order to exempt a defendant on

grounds of mental retardation. Thus a defendant with an IQ of 70 or below who established, for example, that he had “diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, [and] control impulses,” but who did *not* establish that he also had diminished capacity to “understand others’ reactions” would have failed to establish mental retardation, and could therefore be executed.

It can readily be seen that this approach fails to protect the entire class of persons with mental retardation, and enactment would therefore place the federal government in violation of the Eighth Amendment rule of Atkins. Indeed, the whole point of the Supreme Court’s decision in Atkins was that each of these facets of moral culpability was too difficult to determine reliably on a case-by-case basis, and that the severity of the disability suffered by all persons with mental retardation (whose intellectual functioning places them, by definition, in the bottom 2-3 percent of the population) justifies a categorical ban.

There is essentially only one accepted definition of mental retardation in use by psychologists and psychiatrists, with minor variances in wording. The majority opinion in Atkins cited the following definition, which was promulgated in 1992 by the American Association on Mental Retardation:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

122 S.Ct. at 2245 n.3. If a definition of mental retardation is felt to be needed in the Federal Death Penalty Act, that definition (or the essentially identical revision promulgated by the AAMR in 2002) should be used. The fact that the terminology employed in this draft of the Federal Death Penalty Reform Act of 2006 would extend to only a fraction of the people who are recognized as having mental retardation under virtually every other provision of state and federal law is proof that this language is unconstitutionally narrow and would fail to protect many (indeed almost all) members of the class of impaired defendants who are, in fact,

exempt from execution under Atkins.

The procedures to be employed are also undesirable. Rather than a pretrial judicial determination (as occurs with competency to stand trial, for example, see 18 U.S.C. § 4241), this draft would wastefully require a defendant with mental retardation to go through the entire elaborate structure of a capital trial (with special jury selection procedures, bifurcated jury sentencing, special counsel provisions, and so forth), only to establish at the end of the process that he suffered all along from a life-long disability that rendered moot the entire death-penalty aspect of the proceedings—and that could have been determined at the start. Because mental retardation (unlike mental illness) is an essentially fixed condition that must have existed prior to age 18 and that does not resolve or dissipate over time, it is obviously more efficient and more logical to determine this issue before trial rather than at the end of the proceedings. Almost all state statutes implementing mental retardation bars in death penalty proceedings adopt this approach. *See, e.g.*, N.C. Gen. Stat. Ann. 15A-2005(c); Tenn. Code Ann. § 39-13-203(c).

Delaying the jury's mental retardation verdict until *after* the presentation of aggravation evidence is also unfair, because it ensures that the jury will not address the relatively straightforward issues of whether the defendant meets the clinical definition of mental retardation until it has been overwhelmed with inflammatory information about the defendant's prior record and bad character and with emotionally powerful victim impact evidence. Just as it has long been thought unfair to present *sentencing* evidence (including evidence of prior offenses and bad character) to a jury before the defendant's *guilt* or innocence has been determined, so too is it unfair to delay a determination of whether the defendant has the immutable disability of mental retardation until all of the evidence that might make the jury wish to impose the death penalty—retardation or no retardation—has been presented.

If a procedure for the determination of mental retardation is to be added to the FDPA, the statute should provide for a pretrial judicial determination analogous to a competency determination. In making that determination, the court should be guided by the actual clinical definition of mental retardation invariably employed by mental health professionals who assess the presence or absence of mental retardation in other settings. If the court determines that the defendant did not have mental retardation, the trial would proceed in the normal fashion, and if

the defendant is convicted he would retain the right (as required by *Lockett v. Ohio* and its progeny) to present evidence of his mental impairments to the sentencing jury as a mitigating factor.

Also in **Section 4, Subsection (7)**, the proposed 18 U.S.C. 3593(b)(1) and (2) set up a partial new **procedure for pretrial rebuttal mental health evaluations in capital cases** without taking into account the detailed set of procedures that only recently went into effect with the December, 2002 amendments to Rule 12.2, Fed.R.Crim.P. Rule 12.2 already requires written pretrial notice of expert mental health mitigation testimony, and authorizes government rebuttal evaluations following such notice. Adding on a statutory provision that is much less detailed than Rule 12.2 is likely to cause confusion, while adding little or nothing to the government's valid entitlement to a fair opportunity to rebut the defendant's mitigation.

In the proposed 18 U.S.C. § 3593(b)(1) and (2) , and at several other points in the legislation, the Act creates a new requirement that the defendant personally sign and serve **notice of all mitigating** factors upon which he will rely at sentencing. While this proposal has a superficially attractive symmetry to the government's obligation to provide pretrial notice of aggravating factors, it overlooks the real differences between aggravation and mitigation. Most importantly, an across-the-board notice requirement for defendants would effectively require many defendants to acknowledge factual guilt before trial, and would thus be unconstitutional. A defendant cannot personally "sign" and file notice of intent to prove a mitigating factor (such as having committed the offense under duress, or under the influence of extreme emotional disturbance) without admitting guilt of the underlying offense. That is why, to my knowledge, no state death penalty statute requires this kind of broad pretrial notice of mitigating factors, and why this provision would be unenforceable under the Fifth Amendment.

**Section 4, Subsection 5—Directive that the sentencer must avoid "any influence of sympathy."**

This subsection would insert into 18 U.S.C. § 3593(e) the following sentence:

In assessing the appropriateness of a sentence of death, the jury, or if

there is no jury, the court must base the decision on the facts of the offense and the aggravating and mitigating factors *and avoid any influence of sympathy*, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.

The evident purpose of this provision would be to allow the government to seek a jury instruction using this verbiage. However, instructing a capital sentencing jury to avoid “any influence” of sympathy when choosing between life and death runs a grave risk of violating the constitutional requirement of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), that the sentencer consider all relevant mitigating evidence before imposing death as punishment. I realize that in California v. Brown, 479 U.S. 538 (1987), the Supreme Court narrowly upheld a rather different instruction not to be swayed by “mere sentiment, conjecture, sympathy, [or] sympathy. . . .” However, the language proposed here is much more sweeping. It is simply impossible to reconcile a prohibition of “any influence of sympathy” with the constitutional directive to consider the kinds of mitigating evidence—including horrific childhood abuse, or severe mental and physical disabilities—which tend to elicit sympathy by their very nature. There is no reason to push the constitutional envelope in order to help the government persuade jurors to stifle their own sympathetic responses to those “compassionate or mitigating factors stemming from the diverse frailties of humankind” which must be considered “as a constitutionally indispensable part of the process of inflicting the penalty of death.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ). This amendment is unnecessary, unwise, and unconstitutional.

### **Section 7: Amendments relating to Section 3005 of Title 18 (appointment of counsel).**

Ever since 1790, federal law has required appointment, upon request, of two “counsel learned in the law” at the time that a defendant is *indicted* for a capital offense.<sup>4</sup> This amendment would remove part of that entitlement for the first time, by delaying appointment of capitally-qualified counsel until the Attorney General

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<sup>4</sup>In 1994 this provision was strengthened in various ways, including addition of a provision making clear that at least one counsel so appointed must be learned in the law “applicable to capital cases,” and requiring the court to consider the recommendation of the Federal Defender in appointing counsel.

actually decided to seek the death penalty. This decision typically comes many months and even years after indictment, so the effect of this provision would be to cause an enormous delay before entry of capitolally-qualified counsel in most cases where the death penalty is eventually sought, and to delay such appointment until a critical decision-point—the government’s decision whether to seek death—has passed.<sup>5</sup>

This provision would overrule the First Circuit’s decision in In re Sterling-Suarez, 306 F.3d 1170 (1st Cir. 2002), which applied § 3005 to require a district court to appoint “learned counsel” upon indictment. Rejecting the government’s policy arguments in favor of delayed appointment of death-qualified counsel in that case, Judge Boudin observed,

In some cases the early appointment of learned counsel will not be wasted at all but may well make the difference as to whether the Attorney General seeks the death penalty (and perhaps as to whether defendant lives or dies). Further, the submission to the Attorney General is a comparatively informal one and in those cases where the opposition succeeds in persuading the Attorney General not to seek the death penalty, a substantial additional expenditure on the trial and sentencing phase of a capital case is likely to be avoided.

Id. at 1175. *Accord*, United States v. Miranda, 148 F. Supp. 2d 292 (S.D.N.Y. 2001). Both fairness and economy support prompt appointment of qualified counsel as soon as possible after indictment.<sup>6</sup> Removing this entitlement would

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<sup>5</sup>As pointed out above, the delays occasioned by the Attorney General’s death penalty review process have been extremely long, averaging 23 months from indictment to death notice for the first 25 defendants authorized for capital prosecution by Attorney General Gonzales.

<sup>6</sup>In 1998 the Judicial Conference of the United States adopted a series of recommendations contained in FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, also known as the Spencer Report. Explaining these official judiciary policies, the Commentary to the Spencer Committee’s recommendations made the same point as *Suarez* court concerning the importance and cost-effectiveness of *early* appointment of death-qualified defense counsel:

Recommendation 1(b) calls for the appointment of specially qualified counsel “at the outset” of a case, because virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation,

work counter to President Bush's expressed support for increasing the quality of the defense afforded to defendants in capital cases, while weakening a protection that has been in place since the first years of our nation's existence.

That said, it is possible that the original purpose of this proposed revision to § 3005 was merely to obviate the need for appointment of two counsel in cases where they are clearly not needed. Alone among the federal circuits, the Fourth Circuit has held that "18 U.S.C. § 3005 creates an absolute right to two attorneys in cases where the death penalty may be imposed, even when the government does not, in fact, seek the death penalty." United States v. Boone, 245 F.3d 352, 358-59 (4th Cir. 2001). If Congress wishes to overrule this holding, it could do so simply by providing that the filing of a waiver of the death penalty by the government renders the provisions of 18 U.S.C. § 3005 inapplicable. In this way, the government could promote efficiency in the administration of the Criminal Justice Act by acting expeditiously itself to inform the court and the accused that the death penalty will not be an issue in the case.<sup>7</sup> But so long as the government insists on retaining the option to seek the death penalty, the accused should have qualified counsel capable of defending a capital case. Given how sluggish the Justice Department's death penalty bureaucracy has become, there is something unseemly

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are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal "authorization process" adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence. (See United States Attorney's Manual § 9-10.000.) Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant. A "mitigation investigation" therefore must be undertaken at the commencement of the representation. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

*Id.* at 41-42.

<sup>7</sup>I note that such an amendment would comport with existing Judiciary policy, which encourages district judges (except in the Fourth Circuit, who must apply Boone) to reduce costs by relieving second counsel and lowering hourly rates whenever death is removed as a possible punishment in a case. VII GUIDE TO JUDICIARY POLICIES AND PROCEDURES: APPOINTMENT OF COUNSEL IN CRIMINAL CASES Chapter 602.B.2.

about any proposal to hobble the government’s courtroom adversaries as a way of addressing the wastefulness of its own overly-centralized and almost interminable death penalty review process.

### **Section 8(a)–Narrowing of “equally culpable offender” mitigating factor**

Section 8(a) would substantially narrow the jury’s power to consider, as a reason not to impose the death penalty, the fact that other equally guilty offenders in the same case are escaping such punishment. Currently, § 3592(a)(4) directs the sentencer to consider, as a mitigating factor, whether “[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death.” Section 8(a) would narrow that mitigating factor to permit jury consideration only of the fact that “the Government could have, but has not, sought the death penalty against another defendant or defendants, equally culpable in the crime.”

The effect of this change is to allow the jury to take intra-case fairness into account only when disparities of treatment are created by the plea bargaining and charging process. If such disparities are produced by other factors—such as divergent jury sentencing verdicts, or the vagaries of apprehension, extradition and prosecution—the jury will not be able to take them into account. An example of this might include the fact that two 17-year-old defendants are exempt from the death penalty by virtue of their birth dates, leaving a single 18-year-old to face death alone. Likewise, defendants are not infrequently immunized from the death penalty by the terms of their extraditions from foreign countries: when one defendant is extradited from Egypt and his co-defendants from Germany, Britain, or Canada, the fact that only the first defendant would be facing the death penalty (as a result of the divergent policies of the rendering countries) could not be considered by his jury as a mitigating factor, even if the immunized defendants were equally or more culpable in the offense.

While prosecution decision-making is certainly *one* major reason for potentially unfair capital sentencing disparities, it is not the only one, and there is no good reason for narrowing the jury’s power to consider what is fair under all the circumstances. To be sure, a strong argument can be made that the hypothetical defendants described here might still cite the disparate punishments in their cases as a non-statutory mitigating factor. In all likelihood, however, some federal courts would construe Congress’s enactment of this amendment as intended to preclude reliance on such mitigating factors, while other courts would allow it. In

the absence of any demonstrated need for legislation on this point, the potential for inconsistency and confusion in capital sentencing that this subsection carries with it counsel against its enactment.

**Section 8(c)—Authorization to empanel resentencing juries of less than 12 members over defendant’s objection where court finds “good cause”**

Fed. R. Crim. P. 23(b) currently authorizes an 11-member jury to return a verdict where *one* juror is dismissed for good cause, even without the defendant’s consent or stipulation. This provision presumably already applies to capital as well as non-capital cases. Section 8(c) would apply this to re-sentencing juries in capital cases, but in so doing would remove the 11-juror minimum, thus allowing for even smaller juries --- of virtually any size --- so long as the judge finds good cause for dismissing two or more jurors. Even more significantly, this provision clearly authorizes judges to *empanel* resentencing juries of less than 12 members—with no apparent minimum number—so long as undefined “good cause” is found to exist. I am not aware of any justification for so radical a potential departure from the centuries-old practice of requiring 12-member juries in capital cases, and do not think that Congress should enact it without a very powerful justification being shown.

Thank you for considering these comments. I would be glad to work with the sponsors of this bill to address the significant shortcomings that I have identified today, and welcome any questions you might have.